

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

In the Matter of)
)
Second Periodic Review of the) MB Docket No. 03-15
Commission's Rules and Policies)
Affecting the Conversion) RM 9832
to Digital Television)
)
Public Interest Obligations of TV) MM Docket No. 99-360
Broadcast Licensees)
)
Children's Television Obligations of) MM Docket No. 00-167
Digital Television Broadcasters)
)
Standardized and Enhanced Disclosure) MM Docket No. 00-168
Requirements for Television Broadcast Licensee)
Public Interest Obligations)
)

To: The Commission

COMMENTS OF HARBOR WIRELESS, L.L.C.

Harbor Wireless, L.L.C. ("Harbor") hereby submits its Comments on the *Notice of Proposed Rulemaking* ("NPRM") released January 27, 2003¹ and the *Order* released March 26, 2003² in the above-captioned proceedings. Harbor respectfully requests that the Commission effectuate the statutory intent of the Balanced Budget Act of 1997³ by fostering and enforcing clear deadlines to achieve a timely transition to digital television

¹ FCC 03-8 (rel. Jan. 27, 2003).

² DA 03-872 (rel. Mar. 26, 2003).

³ Pub. L. No. 105-33, 111 Stat. 251 § 3004 (1997) (the "1997 Balanced Budget Act").

(“DTV”) and the clearing of the 700 MHz spectrum for new and improved wireless services. The following is respectfully shown:

Harbor was formed in the year 2000 to develop wireless services and systems in the 700 MHz band. The principals of Harbor are experienced communications entrepreneurs with an established record of constructing and operating broadband wireless networks. Harbor first participated in FCC Auction No. 33 and won a 4 MHz license in the 700 MHz Guard Band covering the Alaska MEA. Harbor next participated in FCC Auction No. 44 and acquired 14 Lower Band 700 MHz licenses in a variety of markets across the U.S. Harbor, in cooperation with other holders of 700 MHz spectrum, now is working to develop new services utilizing this spectrum.

These efforts to develop wireless telecommunications services in the lower 700 MHz band will succeed only if there is a prompt, well-managed transition to DTV. Harbor’s operating experience clearly shows that wireless services must hold the promise of becoming ubiquitous within a reasonably discernable timeframe in order to gain the requisite customer acceptance. Unfortunately, the current transition scheme undermines any confidence in the marketplace that the DTV conversion will be completed on a full scale basis within a predictable period. The exceptions to the DTV conversion deadline embodied in Section 309(j)(14)(B) of the Communications Act of 1934, as amended,⁴ created considerable uncertainty as to whether the December 31, 2006 transition date was real. This initial uncertainty has given way to a conventional wisdom, fueled by a steady

⁴ 47 U.S.C § 309(j)(14)(B).

flow of trade press articles,⁵ that there will be wholesale extensions of the December 31, 2006 DTV conversion date. The NPRM appears to reflect this market perception. By devoting extensive attention to the process by which extensions of the deadline based upon the 15% exception will be acted upon -- and by seeking comment on the possibility that a “blanket exception” might be granted, even on a national basis -- the Commission has given credence to the view that the 2006 transition deadline should not be considered real. *See* NPRM, paras 69 to 95.

The belief in the marketplace that broadcast uses of the lower 700 MHz band will not be largely discontinued by 2006 is having an immediate adverse effect on the ability of Harbor and others to develop 700 MHz telecommunications services even in markets where broadcast incumbency is not a problem. Manufacturers have been slow to devote the necessary resources to the development of state-of-the-art 700 MHz products due to uncertainty concerning the likely size of and penetration rate in this market, and this hesitancy will continue unless and until the timing of the resolution of the broadcast

⁵ See, e.g., *FCC Delays 700 MHz Auction for the 5th Time as DTV Issues Linger*, Communications Daily, July 12, 2001 (reporting that “industry and FCC officials increasingly acknowledge difficulty of clearing broadcasters from the band by 2006”); *Powell Questions Future Role of Over the Air TV*, Warren’s Cable Regulation Monitor, April 9, 2001 (Chairman Powell “repeated that government committed error by setting premature 2006 deadline”); *Hearing of the Telecommunications and Internet Subcommittee of the House Energy and Commerce Committee*, Federal News Service, March 29, 2001 (Chairman Powell testifies that the 2006 transition target is “extremely optimistic”); *FCC Postpones Planned Votes on DTV Rules for Cable and DBS*, Satellite Week, January, 15, 2001 (reporting that Chairman Kennard might propose extending the DTV transition deadline 2 years to 2008); *FCC Commissioners Differ Over Merger Authority*, DTV Transition, Warren’s Cable Regulation Monitor, December 4, 2000 (Commissioner Powell quoted as calling the 2006 deadline for DTV to reach 85% household penetration “unrealistic”).

incumbency issue is known. Lenders also are reluctant to commit money to the 700 MHz telecommunication business because of uncertainty as to when they will start earning a return of their investment. And licensees are deferring plans to build out particular markets until they can gain some confidence that 700 MHz services will be capable of establishing a nationwide footprint in the foreseeable future. In effect, the uncertainties surrounding the DTV transition timetable are completely undermining the explicit goal of the 1997 Balanced Budget Act, which required the FCC to reclaim spectrum in the 700 MHz band and to make it available for new and improved wireless services. This laudatory statutory goal will not be accomplished if the Commission does not establish and enforce clear deadlines for the transition to DTV.

In Harbor's view, the Commission needs to take a series of swift and decisive actions in order to avoid postponing indefinitely or destroying the promise of the 700 MHz band, and these proceedings provide the perfect vehicle for such initiatives:

- Strict Enforcement of Deadlines – The Commission needs to use this phase of the proceedings to send a clear message to television broadcasters that established deadlines will be strictly enforced.⁶ For example, further extensions of the construction completion

⁶ Harbor believes that the sanctions the Commission recently announced for failure to meet DTV construction deadlines are too lenient. *See Remedial Steps for Failure to Comply with Digital Television Construction Schedule, Report and Order and Memorandum Opinion and Order on Reconsideration*, FCC 03-77 (rel. April 16, 2003). The stated policy would permit an incumbent to extend its compliance deadline by as much as one full year without threat of license cancellation. Even if a digital license is cancelled, the incumbent may still apply for a new channel. Harbor submits that these timeframes should be substantially reduced, and that incumbents should be barred from seeking additional licenses for digital channels where they've had an earlier license revoked for failure to timely construct.

deadlines that originally were set at May 1, 2002 should not be contemplated for other than truly unique, exceptional and/or unforeseeable circumstances beyond the control of the licensee, and financial hardship should no longer be considered an adequate justification. And, the Commission should avoid going down the extension road with licensees that are subject to the May 1, 2003 date, since stations subject to this extended date already have received a significant accommodation. The Commission also should set firm dates by which digital stations will achieve full replication and maximization to avoid being deemed abandoned or losing interference protection. Finally, the Commission should adopt and strictly enforce explicit deadlines for broadcasters to make their final in-core channel elections, since early elections are essential for others to plan moves to vacated digital in-core channels on a timely basis.

- Avoid “Blanket” Extensions – The Commission cannot afford to send a signal to the marketplace that any “blanket” extensions of the transition deadlines are contemplated. As the Commission learned when its original approach to the implementation of the UNE rules was overturned by the U.S. Court of Appeals for the D.C. Circuit,⁷ some statutory analyses require a “granular” approach in which individualized market-by-market, station-by-station circumstances must be considered. Proper incentives to promote the DTV transition will exist only if extensions become the exception and not the rule.

⁷ United States Telecom Association, et al. v. FCC, 290 F.3d 415 (2002) (subsequent history omitted).

- Seek Congressional Action - The NPRM demonstrates beyond question the complex, ambiguous and cumbersome nature of the 15% exception. The Commission should take a proactive role in seeking legislative changes that would establish a firm discernable enforceable deadline by which the digital conversion will be complete.

Harbor's call for the FCC to establish and enforce unambiguous transition deadlines finds support from others who already have submitted their comments in these proceedings.⁸ In the aggregate, these commenters represent a significant cross-section of the existing 700 MHz licensees and key suppliers. The Commission should take the registered concerns of this group as evidence of a serious problem that requires attention, and not allow the views of well-heeled incumbent broadcasters to overshadow the consensus of emerging 700 MHz wireless service providers. The commenters who represent this nascent 700 MHz band are protecting not only their own interests, but those of future 700 MHz license holders and others who have not yet been given a voice in these proceedings, *e.g.*, future public safety licensees and, most importantly, the public which ultimately should benefit from the services intended to be provided in the 700 MHz band..

⁸ See: (1) comments of Cavalier Group LLC; (2) Comments of Crown Castle USA, Inc.; (3) Comments of Aloha Partners, LP; (4) Comments of Kahokla Telephone Association, Inc., Peoples Telephone Cooperative, Inc. and Arctic Slope Telephone Association Cooperative, all filed April 14, 2003.

WHEREFORE, the foregoing having been duly considered, Harbor respectfully requests that the Commission take actions in these proceedings consistent with these comments.

Respectfully submitted,

HARBOR WIRELESS, L.L.C.

By:

Barry B Lewis
President
Harbor Wireless, L.L.C.
2420 Sand Hill Road
Suite 205
Menlo Park, CA 94025
(650) 324-6885

April __, 2003